

FCC MAIL SECTION

Federal Communications Commission

DA 96-1835

Nov 14 8 33 AM '96

DISPATCHED BY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

NEXTEL COMMUNICATIONS, INC.

Request for a Pioneer's  
Preference for a Wide-Area  
800 MHz Specialized Mobile  
Radio License in the New York  
Metropolitan Trading Area

GN Docket No. 93-252  
PR Docket No. 93-144

**ORDER****Adopted: November 5, 1996;****Released: November 6, 1996**

By the Chief, Wireless Telecommunications Bureau, and the Chief, Office of Engineering and Technology:

**I. INTRODUCTION**

1. This Order addresses the Request for a Pioneer's Preference filed on October 6, 1994 by Nextel Communications, Inc.<sup>1</sup> Nextel seeks a pioneer's preference for a wide-area 800 MHz Specialized Mobile Radio (SMR) license in the New York Metropolitan Trading Area pursuant to the Commission's *Third Report and Order* in the pioneer's preference review proceeding<sup>2</sup> and Section 1.402 of the Commission's Rules.<sup>3</sup> Nextel claims entitlement to a pioneer's preference for a wide-area 800 MHz SMR license on three grounds: (1) it is "the creator, developer, and operator -- the pioneer -- of wide-area SMR systems and technology";<sup>4</sup> (2) the Commission's consideration in PR Docket No. 93-144 of licensing contiguous 800 MHz SMR channels by Major Trading Areas (MTAs) was "based on Nextel's recommendation";<sup>5</sup> and (3) it has been deprived of economic benefits that it "should have

<sup>1</sup> Nextel Request for Pioneer's Preference, October 6, 1994 ("*Nextel Request*"). Nextel filed an Amendment to its Pioneer's Preference Request ("*Amendment*") on September 18, 1995.

<sup>2</sup> *Review of Pioneer Preference Rules, Third Report and Order*, ET Docket No. 93-266, 10 FCC Rcd 13183 (1995) (*Third Report and Order*).

<sup>3</sup> 47 C.F.R. § 1.402.

<sup>4</sup> Nextel Request at ii.

<sup>5</sup> *Id.* at 2.

derived from a wide-area SMR license" because of the Commission's delayed rulemaking process.<sup>6</sup> For the reasons set forth below, the Bureau and the Office dismiss Nextel's request.

## II. DISCUSSION

### A. Evolution of Pioneer's Preference Rules

2. The Commission adopted its pioneer's preference rules in April 1991 to promote the development of new technologies and services and to improve existing services.<sup>7</sup> The benefit of receiving a pioneer's preference is that a pioneer's preference recipient's license application is not held subject to mutually exclusive applications. The Commission's rationale for establishing pioneer's preference procedures was to "reduce for innovators the delays and risks associated with the Commission's allocation and licensing process."<sup>8</sup> In fashioning these procedures, the Commission emphasized that its goal was "not to reward past innovators, but to encourage future technological innovation and new services by encouraging present and future innovators to submit proposals to the Commission that would otherwise not be submitted."<sup>9</sup> The Commission was also concerned that the existence of such preferences not frustrate its goals of promoting competition and providing new services to the public expeditiously.<sup>10</sup>

3. To accomplish these goals, the Commission placed procedural limitations on the circumstances in which applicants may request a pioneer's preference. Section 1.402 provides that a party seeking a pioneer's preference may submit a request only if (1) the request is associated with a petition for rulemaking which it has filed pertaining to a new service or technology, or (2) the request is associated with an existing proceeding in which a notice of

---

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order*, GEN Docket No. 90-217, 6 FCC Rcd 3488 (1991) (*Pioneer's Preference Report and Order*), *recon.*, *Memorandum Opinion and Order*, 7 FCC Rcd 1808 (1992) (*Pioneer's Preference Memorandum Opinion and Order*), *further recon. denied, Memorandum Opinion and Order*, 8 FCC Rcd 1659 (1993). In October 1993, the Commission initiated a review of its pioneer's preference rules to assess the effect of its competitive bidding authority for assigning licenses. *See Review of the Pioneer's Preference Rules, First Report and Order*, ET Docket No. 93-266, 9 FCC Rcd 605 (1993), *recon. denied, Memorandum Opinion and Order*, 9 FCC Rcd 6837 (1994); *Second Report and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 4523 (1995); *Third Report and Order*, 10 FCC Rcd 13183 (1995); *Memorandum Opinion and Order*, 11 FCC Rcd 2468 (1996). *See also Memorandum Opinion and Order on Remand*, ET Docket No. 93-266 and GEN Docket No. 90-314, 9 FCC Rcd 4055 (1994).

<sup>8</sup> *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3488, ¶ 1.

<sup>9</sup> *Pioneer's Preference Memorandum Opinion and Order*, 7 FCC Rcd at 1812, ¶ 25.

<sup>10</sup> *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3492, ¶ 32.

proposed rulemaking has not yet been adopted.<sup>11</sup>

4. In 1995, the Commission's pioneer's preference rules were modified, in part pursuant to domestic legislation enacted in 1994 to implement the General Agreement on Tariffs and Trade (GATT).<sup>12</sup> This legislation, in relevant part, requires the pioneer's preference regulations to include, for pioneer's preference requests accepted for filing after September 1, 1994, "such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of [a pioneering] contribution justifies any reduction in the amounts paid for comparable licenses."<sup>13</sup> The Commission's implementing rules provide that, in order to qualify for a pioneer's preference in services in which licenses are awarded by competitive bidding and in which pioneer's preference requests were accepted for filing after September 1, 1994, an applicant must "demonstrate that the Commission's public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license."<sup>14</sup>

#### B. Nextel's Request

##### 1. *Timing Issues*

5. Nextel's request, including its supplemental amendment, does not meet the preconditions for submitting a pioneer's preference request. The request is not associated with a petition for rulemaking filed by Nextel,<sup>15</sup> but pertains to a proceeding in which a notice of proposed rulemaking had already been adopted. The Commission first recognized the development of wide-area SMR technology by Nextel (then Fleet Call, Inc.) in its 1991 *Fleet Call* decision, which granted Nextel a five-year period to construct and operate wide-area SMR systems in several markets, including the New York system that is now the subject of Nextel's pioneer's preference request.<sup>16</sup> Following the *Fleet Call* decision, several parties filed

---

<sup>11</sup> 47 C.F.R. § 1.402(a).

<sup>12</sup> *Uruguay Round Agreements Act*, 47 U.S.C. § 309(j)(13) (GATT Legislation).

<sup>13</sup> 47 U.S.C. § 309 (j)(13)(D)(ii), (iv).

<sup>14</sup> 47 C.F.R. § 1.402(i).

<sup>15</sup> Nextel (then Fleet Call, Inc.) previously filed a petition for rulemaking proposing that competitive bidding be used on a test basis to license fallow 800 MHz SMR spectrum. *Petition for Rulemaking by Fleet Call, Inc.*, filed April 22, 1992. The Chief, Private Radio Bureau dismissed Fleet Call's petition because the Commission lacked statutory authority at the time to select licensees by auction. *Policies and Rules for Licensing Fallow 800 MHz Specialized Mobile Radio Spectrum Through a Competitive Bidding Process*, Order, RM-7985, 7 FCC Rcd 8590 (Private Radio Bureau 1992).

<sup>16</sup> *Fleet Call, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991).

petitions for rulemaking requesting that the Commission establish rules for wide-area licensing of so-called "enhanced" SMR systems, such as those being constructed by Nextel.<sup>17</sup> In 1993, the Commission responded to these petitions by adopting a *Notice of Proposed Rulemaking* in PR Docket No. 93-144,<sup>18</sup> which proposed to allow 800 MHz SMR operators to obtain licenses that would permit aggregation of multiple SMR channels within an MTA.<sup>19</sup> We note that the Commission did not, before adoption of the *800 MHz Notice*, release a public notice specifying the cutoff date for acceptance of 800 MHz pioneer's preference applications, pursuant to Section 1.402(c) as was then in effect.<sup>20</sup> Nextel's request, however, was filed almost 16 months after the *800 MHz Notice* was released. Even if Nextel was unaware that the Commission intended to release the *800 MHz Notice* before that *Notice* was released, Nextel's 16-month delay in filing its request was an unreasonably long period of time.

6. Nextel contends that notwithstanding the Commission's release of the *800 MHz Notice*, its request should be treated as timely because it predates the Commission's *Further Notice of Proposed Rulemaking* in PR Docket No. 93-144.<sup>21</sup> In this *800 MHz Further Notice*, the Commission modified its prior wide-area licensing proposal by designating 10 MHz of contiguous SMR spectrum for MTA-based licensing, with licensees to be selected by

---

<sup>17</sup> See *Petition for Rulemaking by National Association of Business and Educational Radio*, filed March 13, 1992; *Petition for Rulemaking by A & B Electronics, Inc.*, filed May 26, 1992; *Petition for Rulemaking by American Mobile Telecommunications Association*, filed October 26, 1992.

<sup>18</sup> See *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Notice of Proposed Rulemaking*, PR Docket No. 93-144, 8 FCC Rcd 3950 (1993) (*800 MHz Notice*).

<sup>19</sup> *Id.* at ¶ 7. The *800 MHz Notice* proposed Basic Trading Areas (BTAs) as an alternative service area definition.

<sup>20</sup> 47 C.F.R. § 1.402(c) (1994) provided as follows:

Pioneer's preference requests relating to a specific new spectrum-based service or technology that will be considered by the Commission will not be accepted after a specified date prior to the Commission's consideration of a notice of proposed rule making that addresses the service or technology. This date will be announced by public notice at least 30 days in advance.

Subsequent to the filing of Nextel's pioneer's preference request, the Commission modified its rules in the *Second Report and Order* in the pioneer's preference review proceeding to provide that pioneer's preference requests must be filed prior to the Sunshine Notice for the agenda meeting that announces the initiation, by either a notice of inquiry or notice of proposed rulemaking, of a proceeding pertaining to a specific new spectrum-based service or technology. See 47 C.F.R. 1.402(b).

<sup>21</sup> *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Further Notice of Proposed Rulemaking*, PR Docket No. 93-144 and PP Docket No. 93-253, 10 FCC Rcd 7970 (1994) (*800 MHz Further Notice*).

competitive bidding. Prior to the *800 MHz Further Notice*, Nextel proposed using a 10 MHz block for wide-area systems in comments filed in the Commission's Commercial Mobile Radio Services (CMRS) proceeding in GN Docket No. 93-252,<sup>22</sup> which sought to establish regulatory parity in the rules governing SMR and competing CMRS services, such as cellular and PCS.<sup>23</sup> Because the *800 MHz Further Notice* in PR Docket No. 93-144 follows Nextel's proposal in this respect, Nextel contends that it should be allowed to seek a pioneer's preference based on the proposal.<sup>24</sup>

7. Nextel's reliance on the timing of the *800 MHz Further Notice* in relation to its pioneer's preference request is misplaced. Section 1.402 states, in relevant part, that a pioneer's preference may be filed only in a proceeding in which "a notice of proposed rulemaking has not yet been adopted."<sup>25</sup> By its plain language, the rule does not provide for reopening of the pioneer's preference filing window where an initial Notice of Proposed Rulemaking is later modified by a Further Notice of Proposed Rulemaking. Moreover, such an interpretation would be inconsistent with the intent of the rule. The purpose of the restriction is to ensure that pioneer's preferences stimulate future innovation. As the Commission stated in adopting the rule, "until we make a proposal an innovator may submit a rulemaking petition or preference request that may become the foundation of our proposal, but after the NPRM is adopted the nature of the proposed new service or technology is essentially defined."<sup>26</sup>

8. Further, Nextel's proposal to designate 10 MHz of spectrum for wide-area SMR systems does not fit within the category of innovative "new service or technology" as required by Section 1.402(a).<sup>27</sup> The proposal did not fundamentally alter the Commission's plans for the service, but was simply a modification to a pre-existing Commission proposal for wide-area licensing. The Commission stated that the rule changes proposed in the *800 MHz Further Notice* were "intended to build upon and refine our previous efforts to promote the development of wide-area SMR service in the 800 MHz band, particularly our 1993 Notice of Proposed Rulemaking that initiated this docket."<sup>28</sup> Consistent with that purpose, the differences between the Commission's proposals in the *800 MHz Further Notice* and those in

---

<sup>22</sup> *Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, First Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994).

<sup>23</sup> Nextel Request at 2 n.4.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> 47 C.F.R. § 1.402(a).

<sup>26</sup> *Pioneer's Preference Memorandum Opinion and Order*, 7 FCC Rcd at 1811, ¶ 23.

<sup>27</sup> See 47 C.F.R. § 1.402(a).

<sup>28</sup> *800 MHz Further Notice*, *supra* note 21, ¶ 2.

the earlier *800 MHz Notice* are primarily an outgrowth of statutory and regulatory changes -- particularly the reclassification of interconnected SMR as CMRS and the advent of the Commission's auction authority -- rather than of technological innovation within the service.

## 2. Substantive Issues

9. Even if Nextel had filed its request before the *800 MHz Notice* was issued, Nextel would still not be eligible for a pioneer's preference based on the information submitted. Section 1.402 of the Commission's Rules requires that a party requesting a pioneer's preference demonstrate that it has developed the capabilities or possibilities of a new technology or service, or has brought the technology or service to a more advanced or effective state.<sup>29</sup> The applicant must also demonstrate that the new service or technology is technically feasible by submitting either the summarized results of an experiment or a technical showing.<sup>30</sup> In addition, a preference is granted only if the service rules adopted are a reasonable outgrowth of the applicant's proposal and lend themselves to grant of a preference.<sup>31</sup>

10. Furthermore, Section 1.402, as amended pursuant to GATT, requires an applicant in services in which licenses are awarded by competitive bidding and in which pioneer's preference requests were accepted for filing after September 1, 1994, to demonstrate that "the Commission's public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference."<sup>32</sup> Specifically, the applicant must show that it may lose its intellectual property protection because of our public process; that the damage to its intellectual property is likely to be more significant than in other contexts, such as the patent process; and that the guarantee of a license is a significant factor in its ability to capture the rewards from its innovation.<sup>33</sup>

11. Nextel does not satisfy any of the above criteria. Nextel does not present a compelling argument that its digital mobile technology is sufficiently innovative to justify a preference.<sup>34</sup> That is, Nextel's request did not reflect technology that was substantially new and innovative when compared to its own pre-1992 technology in order to qualify for a pioneer's preference under the Commission's program. We also find that the Commission's rules governing the licensing of contiguous 800 MHz SMR channels by Major Trading Areas

---

<sup>29</sup> 47 C.F.R. § 1.402(a).

<sup>30</sup> 47 C.F.R. § 5.207.

<sup>31</sup> 47 C.F.R. § 1.402(a).

<sup>32</sup> 47 C.F.R. § 1.402(i).

<sup>33</sup> *Id.*

<sup>34</sup> See Nextel Request at 6-12.

(MTAs) are not a reasonable outgrowth of Nextel's 1992 proposal to license fallow 800 MHz spectrum for wide-area systems.<sup>35</sup> Although the Commission recognized the development of wide-area SMR technology as early as 1991, Nextel's original proposal was based on technology developed for use on non-contiguous spectrum. The Commission's revised SMR rules, however, are designed to allow SMR licensees (including Nextel) to use technologies developed for contiguous spectrum. Because the 800 MHz SMR rules were developed independently of Nextel's proposal, they cannot be properly viewed as "a reasonable outgrowth of the proposal."

12. Further, Nextel fails to demonstrate that the Commission's public rulemaking process inhibits Nextel from capturing the economic rewards of its innovation unless it is granted a pioneer's preference. In fact, by its own pleading, Nextel demonstrates that it has been implementing, and continues to implement, its "seamless digital mobile network" from as early as 1992.<sup>36</sup> This digital system now provides commercial wide-area SMR services to various cities within the United States.<sup>37</sup> Given this continued growth, it is difficult to see how the Commission's rulemaking process inhibited Nextel from reaping the economic rewards of its innovation.

### III. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED that the Request for and Amendment to a Pioneer's Preference filed by Nextel Communications, Inc. IS DISMISSED.

---

<sup>35</sup> See note 15, *supra*.

<sup>36</sup> Nextel Amendment at 5-6.

<sup>37</sup> *Id.* at 4 n.14.

14. This action is taken pursuant to authority delegated in Sections 0.241 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.241 and 0.331.

**FEDERAL COMMUNICATIONS COMMISSION**

\_\_\_\_\_  
**Michele C. Farquhar, Chief**  
**Wireless Telecommunications Bureau**

\_\_\_\_\_  
**Richard M. Smith, Chief**  
**Office of Engineering and Technology**

**FCC MAIL SECTION**  
**NOV 14 8 33 AM '96**  
**DISPATCHED BY**